Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-532

HARVEY S. KORNIT,

Petitioner,

against

BOARD OF EDUCATION of the
PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT
PLAINVIEW, NEW YORK,

Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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HARVEY S. KORNIT,

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BOARD OF EDUCATION of the PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT PLAINVIEW, NEW YORK,

Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Harvey S. Kornit, prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Second Circuit entered in the Office of the Clerk on September 15, 1976. A Petition for Rehearing was submitted to the Court of Appeals for the Second Circuit on September 29, 1976. The Petition for Rehearing was denied on July 19, 1977.

Opinions Below

The opinion of the District Court dismissing this action on substantive grounds is not reported and is reproduced as Appendix I, *infra* at 1a-5a. The opinion of the District Court denying a motion to amend defendant parties is un-

reported and is reproduced as Appendix II, *infra* at 6a-7a. The opinion of the United States Court of Appeals for the Second Circuit remanding that this action be dismissed for lack of subject matter jurisdiction is reported at 542 F.2d 592 (2d Cir. 1976) and is reproduced as Appendix III, *infra* at 8a-11a. The Order of the United States Court of Appeals for the Second Circuit denying a Rehearing is not reported and is reproduced as Appendix IV, *infra* at 12a.

The Order of the United States District Court for the Eastern District of New York is not reported and is reproduced as Appendix V, *infra* at 13a.

Jurisdiction

The Second Circuit rendered its judgment remanding with instructions to dismiss because of the lack of subject matter jurisdiction on September 15, 1976. A Petition for Rehearing submitted on September 29, 1976 was denied on July 19, 1977. The jurisdiction of the Supreme Court of the United States is requested under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Board of Education of the independent Plainview-Old Bethpage School District is amenable as a "person" under the Civil Rights Act of 1871, R.S. § 1979, 42 U.S.C. § 1983 and therefore subject to suit for violation of petitioner's civil rights under Article Fourteen of the United States Constitution.

2. Whether the Superintendent of Schools and the Acting Superintendent of Schools had a pecuniary interest sufficient to disqualify them from acting in a position of adjudication of finality which led to the garnishment of earned

wages for work performed from the salary of the petitioner, an employee of the School District.

3. Whether the School Business Administrator of the Plainview-Old Bethpage School District acted in an unconstitutional and unlawful manner when he garnished the earned wages of petitioner without a lawful court order of execution of garnishment and in amounts excessive of the limitations of the Federal Wage Garnishment Law.

4. Whether the complaint to the United States District Court for the Eastern District stated a cause of action because of the lack of Constitutional Due Process and the violation of petitioner's civil rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution when his earned wages for work performed were garnished from his salary by parties with a pecuniary interest and without a lawful court order.

5. Whether the New York State Taylor Law, Civil Service Law, Sections 200-14, as amended in 1969, places an unfair burden on the collective bargaining process by offering free unpaid labor to school districts through adjudication by agents of boards of education with a pecuniary interest should a contract not be signed and should a work stoppage occur.

Statutes Involved

Federal Civil Rights Act of 1871 § 1; 42 U.S.C. 1983 (1970).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Federal Wage Garnishment Act; 15 U.S.C. §§ 1672, 1673. (Effective July 1, 1970)

§ 1672. Definitions

For the purpose of this title:

(a) The term "earnings" means compension paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

§ 1673. Restrictions on Garnishment

(a) Except as provided in subsection (b) and in section 1675, the maximum part of the aggregate disposable earnings of an individual for any work week which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 in effect at the time the earnings are payable, whichever is less.

In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2)

(b) The restrictions of subsection (a) do not apply in the case of

(1) any order of any court for the support of any person.

(2) any order of any court of bankruptcy under Chapter XIII of the Bankruptcy Act.

(3) any debt due for any State or Federal tax.

(c) No court of the United States or any State may make, execute or enforce any order or process in violation of this section.

New York State Taylor Law (New York Public Employees' Fair Employment Act) 1967, as amended in 1969 to include 2 for 1 penalty, effective April 1, 1969. Civil Service Law Chapters 200-14. Pertinent parts:

§ 210. 1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

§ 210. 2. (d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the chief executive officer of the government involved shall, on the basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such

further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determination shall not be final until completion of the procedures provided for in this subdivision.

§ 210. 2. (g) Payroll deductions. Not earlier than thirty nor later than ninety days following the date of such determination, the chief fiscal officer of the government involved shall deduct from the compensation of each such public employee an amount equal to twice his daily rate of pay for each day or part thereof that it was determined that he had violated this subdivision; such rate of pay to be computed as of the time of such violation. (Technical part omitted)

§ 210. 2. (h) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer, within twenty days of the date on which notice was served or mailed to him pursuant to paragraph (e) of this subdivision, his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did

not violate this subsection, the chief executive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith restore to the employee the tenure suspended pursuant to paragraph (f) of this subdivision, and notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice laws and rules.

Statement of the Case

The plaintiff in this action is a Social Studies teacher in the independent Plainview-Old Bethpage School District on Long Island in New York State. The defendant is the Board of Education, whose members acting as a body corporate, are the administrative trustees of the Plainview-Old Bethpage School District.

In September of 1972 a four-day work stoppage took place at the School District. The plaintiff does not deny his involvement in this work stoppage, but contends that the administrative judicial proceedings which followed the work stoppage allowing agents of the Board of Education with a substantial pecuniary interest to make determinations of guilt and to order the deduction of fines from employees' earned wages for work performed may be a significant factor which caused the work stoppage in the first instance. In addition earned wages were garnished in violation of the Federal Wage Garnishment Law and without a prior impartial hearing.

In his original complaint, filed April 8, 1975, plaintiff challenged, on constitutional grounds, the New York State Taylor Law sections which allowed those administrative judicial proceedings as well as the actual proceedings which took place. Jurisdiction was initially based on the Fourteenth Amendment to the United States Constitution and on both 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

In an opinion and order, decided July 22, 1975, the District Court, the late Honorable Orrin G. Judd, granted defendant's motion to dismiss on substantive grounds, not ruling on the jurisdictional question, 1a-5a.

An appeal was begun to the United States Court of Appeals for the Second Circuit after plaintiff was granted an extension of time on motion to the District Court on September 17, 1975. On May 11, 1976 a motion by plaintiff to amend the defendant parties was denied by the District Court. Memorandum and Order, 6a-7a.

On September 15, 1976, the United States Court of Appeals vacated the judgment of the District Court with instructions to dismiss for lack of subject matter jurisdiction, 8a-11a.

On July 19, 1977, the original panel at the United States Court of Appeals for the Second Circuit denied plaintiff's Petition for Rehearing, 12a.

On September 15, 1977 an order was issued by the District Court, pursuant to the Court of Appeals for the Second Circuit decision, whereby the action was dismissed for lack of subject matter jurisdiction, 13a.

Reasons for Granting the Writ

I.

In holding that the defendant Board of Education could not be considered a "person" for purposes of the Civil Rights Acts of 1871, 42 U.S.C. § 1983, and was thus not amenable to suit under that Act as per a decision of the Court of Appeals for the Second Circuit, *Monell* v. *Department of Social Services,* 532 F.2d 259, 263-264 (2d Cir. 1976), certiorari granted, 45 U.S.L.W. 3005 (U.S. July 2, 1976) No. 75-1914.

In the *Monell, supra,* decision the United States Court of Appeals for the Second Circuit reasoned that the Board of Education was part of the City of New York, and that since the City of New York, as a municipality, was exempt from suit under the Civil Rights Act of 1871, 42 U.S.C. § 1983 as per the decision of the United States Supreme Court in *Monroe* v. *Pape,* 365 U.S. 187-92 (1961), the Board of Education was exempt as well.

In his petition for rehearing, plaintiff indicated that the Plainview-Old Bethpage School District was an independent New York State instrumentality and not part of any city, town, county or village. The defendant in this action indicated that under the General Construction Law § 66 of New York State a school district is included as a municipal corporation, but this law which is a list of classifications is based on the now repealed General Corporation Law which had a preface by the consolidator of laws that classifications under the repealed General Corporation Law must give way to other laws if they are in conflict. The General Construction Law is in conflict with the General Municipal Law which *does* include cities, towns, counties and villages under its jurisdiction, ***but not*** school districts, which are

under the aegis of the Department of Education of the State of New York. Indeed there are two court decisions which support the contention of plaintiff:

In *Board of Education of Union Free School District No. 1 of Towns of Bethlehem, Coeymans and New Scotland* v. *Wilson,* 1951, 303 N.Y. 107, it was decided that a school district, though defined as a municipal corporation under Section 3 of the former General Corporation Law, has no territorial integrity and is always subject to the reserve power of the state, exercised through the administrative officers in the Education Department to change its territory according to current education needs and educational principles. In another New York Court of Appeals decision, *Central School District No. 1 of Towns of Colchester, Hamden, Hancock, Walton, Andes and Tomkins, Delaware County* v. *State,* 1963, 18 A.D.2d 943, 237 N.Y.S.2d 682, affirmed 13 N.Y.2d 1031, 245 N.Y.S.2d 602, stated that the Section 3 of the former General Corporation Law which included the definition of municipal corporations was required to yield to the General Municipal Law § 2, which does not include school districts within the definition of municipal corporations for purpose of determining whether the school district was entitled to compensation for state's condemnation of land which the school district held for school purposes.

Thusly, the designation of municipal corporation to school districts within the General Construction Law § 66 (or the former General Corporation Law § 3, repealed in 1974) is not as legally binding as opposed to that designation for a city, town, county or village in the General Municipal Law of New York State, § 2.

However it must be pointed out that suit was not brought against the Plainview-Old Bethpage School District but

against the Board of Education of the School District. The Board of Education is the body corporate of trustees of the School District and not barred as officials to suit under *Monroe* v. *Pape, supra,* 191-192, should the school district be considered as a municipal corporation by this Court.

A board of education is not a synonyme for a school district. A board of education, acting as administrative trustees, overseers the operation of a school district, expressing its will by a majority consensus through a superintendent of schools and other agents. Almost all of the 760 school districts of New York State have a board of education elected by the adult inhabitants of the school district area. The monies for the operation of the school district come from contributions on a per capita student population from the New York State government and from the school taxes on residential and industrial property which is determined and levied by the school district after approval by the Board of Education and the local voters. Other funds come from the federal government for special programs. No funds are obtained from a municipality and the Township of Oyster Bay in which the Plainview-Old Bethpage School District is located only serves as a collection agency for the school district's taxes.

Even in *Monell, supra,* which is presently before the United States Supreme Court, the distinction must be made in the meaning and function between the Board of Education and the City School District of the City of New York (its official name). The Board of Education in the City of New York is not elected and its tax base is not independent of general city funds, but once its members have been chosen (2 are chosen by the Mayor and 1 is chosen by each of the five borough presidents for a total of 7 members) it functions as an independent board of trustees of the school system. Funds are obtained from

New York City, New York State and from the Federal government for special programs.

Neither the City School District or the Board of Education of the City School District can be considered as departments of New York City. The City School District is not a mayoral agency or part of the City of New York as would be the case with the Department of Social Services or the Department of Traffic. It acts under the direction of the Department of Education of the State of New York. The Board of Education of the City School District of the City of New York act as the administrative trustees of the school district and can not be substituted in name for the school district which they administer as a body corporate, called the Board of Education.

It is the contention of this petitioner that the Boards of Education of both the Plainview-Old Bethpage School District and the City School District of the City of New York are composed of individuals and persons acting jointly as administrative trustees for their respective school districts and are thus fully amenable to justifiable suit under the *Civil Rights Act of 1871,* 42 U.S.C. 1983.

Suit was brought by this petitioner against the Board of Education of the Plainview-Old Bethpage School District since the Board of Education are the administrative trustees of funds which were garnished unconstitutionally from the earned wages of petitioner by agents of the Board of Education. This action by agents of the Board of Education acting under the New York State Taylor Law is a violation of the Fourteenth Amendment to the United States Constitution in regard to the requirements for Due Process, and an unconstitutional and tortious action under the Fourth Amendment to the United States Constitution, namely the seizure of earned wages without Constitutional

Due Process. The matter is as serious as if the monies had been removed from my home in violation of the Fourth Amendment.

Monroe v. *Pape, supra,* should not be used to prevent suit against any government official who might have committed any unconstitutional acts for his own benefit or for the benefit of the instrumentality in which he is an official, nor should it serve as a protection for an instrumentality which has directly benefitted from the unconstitutional acts of its officials. In the present action suit was brought against the Board of Education as they are the trustees of the funds which were unconstitutionally and illegally garnished from the earned wages for work performed by the petitioner upon adjudication by agents of the Board of Education who had a substantial pecuniary interest because of major responsibilities in the preparation of the school district budget.

The *obiter dictum* of the decision in *Hortonville Joint School District No. 1 et al.* v. *Hortonville Education Assn. et al.,* 426 U.S. 428 (1976), in Point II, Part B, first paragraph, indicated that if there were a financial conflict of interest on the part of the Board of Education in that case, there would apparently be a conflict of interest in the decision making process. The United States Supreme Court found no pecuniary interest in the *Hortonville, supra,* action, but the current matter before the United States Supreme Court has all of the pecuniary ingredients mentioned in the *obiter dictum* of the *Hortonville, supra,* decision.

For the above stated reasons the writ here sought should be granted. Alternatively, the decision below should be vacated and remanded for reconsideration, or the Supreme Court could defer consideration pending its decision in *Monell et al.* v. *Department of Social Services of the City*

of New York et al., supra, in which oral argument is scheduled to be heard on October 12, 1977.

II.

In holding that suit was barred against defendant Board of Education under 42 U.S.C. § 1983 even though suit alleged violation of the Fourteenth Amendment by agents of the Board of Education with a significant pecuniary interest who made determinations that plaintiff had participated in a work stoppage in violation of the New York State Taylor Law and who subsequently garnished penalties from his earned wages for work performed in violation of several United States Supreme Court decisions.

This action is brought on constitutional grounds to the attention of the federal courts, but human logic plays an important role in the various aspects of this action. Under the New York State Taylor Law a school district and its employees are required to bargain collectively in order to reach a contractual agreement. However the Taylor Law also states that the school district employer may fine the employee two days' fine if agreement is not reached and a strike occurs for each day that an employee is not at work. Thus an employee loses one day's wages for the day he was not at work and in addition one day's wages which were earned at work. Thus what may be a threat and a fine for the employee becomes a temptation and reward for a school district. Although this petitioner feels that the loss of all wages, whether earned or not, would not have necessarily occurred had this temptation not existed, he has brought suit only to recover that part of his wages for work performed which were garnished.

The adjudication of school district employees involved in a work stoppage is conducted by the Superintendent of

Schools by mail. Objections to his determination may be made by mail. If he feels that there is merit to an objection he refers the individual to a hearing officer. This is done in about 2% of the cases. The hearing officer is appointed contractually by the Board of Education and/or Superintendent of Schools and is paid school funds. He may or may not be a lawyer, though a lawyer was obtained in those instances in which individuals were granted hearings. The hearing officer is not an employee of New York State and since he is not chosen bilaterally, that is, by the school board and the bargaining agent, he certainly has no judicial authority in accordance with constitutional due process to make judicial determinations which will lead to the garnishment of earned wages of New York State employees.

However it is the Superintendent of Schools who as the chief administrative officer is empowered under the Taylor Law to make judicial determinations of guilt or innocence. The Superintendent of Schools also prepares the Superintendent's Budget for examination and any revision by the Board of Education before the budget is submitted to the school district voters. Thus the Superintendent of Schools has a pecuniary interest in the determination of guilt or innocence. One may consider guilt to be obvious, so it does not matter who the judge is, but it is not only a violation of constitutional rights to due process, but the judicial involvement of someone with an obvious substantial pecuniary interest may be a major cause for the work stoppage to have occurred. It should also be mentioned that the Superintendent of Schools as chief executive officer is designated under the Taylor Law as the official chief collective bargaining negotiator. Thus under the Taylor Law the Superintendent wears many hats and there is an obvious conflict of interest when he is involved in a judicial function which will lead to the garnishment of earned wages for work

performed by employees. His pecuniary interest though not personal and direct is indirect because of his involvement with the Superintendent's Budget. The pecuniary interest becomes more substantial with each day of a work stoppage and significant budget savings can be achieved by the use of unpaid labor for work performed.

The judicial procedures under the Taylor Law are in direct violation of the principle of *Tumey* v. *Ohio,* 273 U.S. 510 (1927) and *Ward* v. *Village of Monroeville, Ohio,* 409 U.S. 57 (1972), which indicates that a person with a substantial pecuniary interest, whether personal and direct or indirect as major responsibility for instrumentality budget preparation cannot act in a judicial capacity.

In addition, *Ward* v. *Village of Monroeville, Ohio, supra,* defines another principle: that the court of instance and finality must be as impartial as any subsequent court of appeal and a lack of competency is not excused because a review or trial *de novo* is available.

Gibson v. *Berryhill,* 411 U.S. 564 (1973), indicates that both of these principles are applicable to administrative proceedings. The *obitur dictum* of *Hortonville* v. *Hortonville, supra,* adds new strength to this petitioner's suit. *Hortonville, supra,* implies that a Board of Education with a pecuniary interest would not be permitted to make judicial determinations. Agents of the Board of Education would by an extension of logic be bound by the same restriction.

Cases concerning the New York State Taylor Law appeared before the United States Supreme Court and were decided on May 13, 1974. These parallel cases were *Sanford et al.* v. *Wilson et al.,* 416 U.S. 977 (1974) and *Collins et al.* v. *Wilson et al.,* 416 U.S. 977 (1974). These cases were appeals from the Court of Appeals of New York. This Court vacated judgments and remanded the cases to the Court of Appeals of New York for further consideration in

light of *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). The Court of Appeals of New York State reaffirmed its decision in both cases on December 19, 1974. 35 N.Y.2d 547. The petitioners returned to the United States Supreme Court and in a memorandum decision the appeals were dismissed for want of a substantial federal question. Mr. Justice Douglas, Mr. Justice White and Mr. Justice Marshall indicated that they would note probable jurisdiction and would set the case for oral argument. 421 U.S. 973.

The current action adds two significant dimensions which were not present in *Arnett* v. *Kennedy, supra. Arnett* v. *Kennedy* did not involve the pecuniary interest on the part of a decision maker nor did it involve the garnishment of earned wages for work performed by the immediate employer. The current action has both of these aspects clearly present, and this case should be judged on its own merits.

Under the United States Supreme Court decision in *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U.S. 337 (1969), wages are protected from garnishment prior to an impartial hearing. A party with a substantial pecuniary interest can not serve in a judicial capacity. The Superintendent of Schools has such a pecuniary interest.

Since the petitioner's wages were garnished in extreme excess of the limits of the Federal Wage Garnishment Law, a violation of that law has also occurred. The Federal Wage Garnishment Law is not limited to commercial transactions and is fully applicable to the garnishment of wages for the payment of fines. If the Federal Wage Garnishment Law were restricted to commercial transactions and debts, there would have been no need to mention the three exempt categories which apply to family support payments or to deductions under the Bankruptcy Act, both of which are court imposed deductions, or to tax indebtedness which can also

be appealed to tax and civil courts before deductions are imposed.

Thus the Taylor Law allows persons with a pecuniary interest to make determinations of guilt or innocence as to violations of the Taylor Law, and to make deductions from wages without a prior impartial hearing and in violation of the limitations of the Federal Wage Garnishment Law. In addition the Taylor Law Penalty Provisions (Amendments of 1969) place an unfair burden on the collective bargaining process by offering to school districts free unpaid labor if no collective bargaining agreement is reached and a work stoppage does occur. The advance knowledge that agents of the Board of Education will hold "court" in the first instance of finality can also effect the collective bargaining process so that a work stoppage might more likely occur.

On their face and as applied the Taylor Law Penalty Provisions are repugnant to the United States Constitution.

If this Court decides not to vacate and remand this case (or grant the writ) as suggested in Point I, *supra*, it is respectfully urged that the writ should be granted for the reasons urged in this point. Alternatively, the Supreme Court could defer consideration of this petition pending its decision in *Monell et al.* v. *Department of Social Services of the City of New York, supra,* for which oral argument is due to be presented on October 12, 1977.

CONCLUSION

For all of the foregoing reasons this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted and the judgment in this case should be vacated and remanded for further proceedings.

Respectfully submitted,

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APPENDICES

APPENDIX I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

HARVEY S. KORNIT,

Plaintiff,

v.

BOARD OF EDUCATION, PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT, NEW YORK,

Defendant.

No. 75 Civ. 518

Decided July 22, 1975

HARVEY S. KORNIT,
pro se, Plaintiff

JOSEPH W. CAMPANELLA, ESQ.
Attorney for Defendant

The Late HONORABLE ORRIN G. JUDD,
District Judge

JUDD, *J.*:

MEMORANDUM AND ORDER

Defendant has moved to dismiss this civil rights action for improper service and for failure to state a valid claim.

Appendix I

Facts

Plaintiff, a social studies teacher employed by the defendant Board of Education, sues to recover $379.84 deducted from his salary as a penalty because of his participation in an illegal strike. He also seeks a determination that the Taylor Law (New York Civil Service Law § 210) is unconstitutional in permitting a deduction from wages without prior hearing.

The summons and complaint was served on an assistant bookkeeper of the Board of Education by a Deputy United States Marshal.

The complaint is 30 pages long with much more argument than facts. Plaintiff alleges that he took part in a four-day work stoppage on September 6, 7, 8 and 11, 1972.

He was notified on September 27, 1972 by the Superintendent of Schools that the Superintendent had determined that his absence constituted participation in a strike, in violation of Section 210(2)(h) of the Civil Service Law, but that he might file an affidavit within twenty days setting forth any facts relied on to show this determination was not correct. Plaintiff responded by a letter which asked for a hearing but did not state any reason for his absence from work. The Acting Superintendent thereafter informed him that the affidavit failed to establish that his absence was not in violation of the Taylor Law and that therefore his objection was denied. On his October pay check a deduction was made for the four days in which he had not been performing his duties, a deduction which was not disputed. The November and December pay checks deducted also the amount paid for four additional days as a penalty under the Taylor Law. Plaintiff's attack is based primarily on an alleged lack of procedural due process and lack of

Appendix I

an impartial hearing before deduction from wages, which plaintiff considers to be a garnishment of wages. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820 (1969). He asserts also that the Board of Education could not provide him an impartial decision because all its members had a pecuniary interest in the decision. *Gibson* v. *Berryhill*, 411 U.S. 564, 93 S.Ct. 1689 (1973) and *Ward* v. *Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80 (1972). The alleged pecuniary interest is said to result from the fact that the Superintendent of Schools and all his assistants and advisors have a responsibility to balance the school budget, to determine expenditures, and to seek sources of revenue, and therefore they cannot act in a detached manner in determining the guilt or innocence of affected employees.

Discussion

1. The service of process conforms substantially with Rule 4(d)(3) of the Federal Rules of Civil Procedure. Since the summons and complaint reached the responsible officials, the Court will not require re-service.

2. The claim of jurisdiction over the Board of Education under 42 U.S.C. § 1983 raises difficult questions. Since the decision of the Supreme Court in *City of Kenosha* v. *Bruno*, 412 U.S. 507, 93 S.Ct. 222(2) (1973), a number of courts have decided that a school board is not a "person" under § 1983. *Patton* v. *Conrad Area School District*, 388 F. Supp. 410 (D. Del. 1975); *Seaman* v. *Spring Lake Park Independent School District*, 387 F. Supp. 1168 (D. Minn. 1974); *Weathers* v. *West Yuma County School District*, 387 F. Supp. 552 (D. Colo. 1974); *Howell* v. *Winn Parish School Board*, 377 F. Supp. 816 (W.D. La. 1974).

This circuit has not dealt directly with the issue. *Newman* v. *Board of Education,* 508 F.2d 277 (2d Cir.), *cert. denied,* U.S. , 95 S.Ct. 1447 (1975); *Lombard* v. *Board of Education,* 502 F.2d 631 (2d Cir. 1974), *cert. denied,* U.S. , 95 S.Ct. 1400 (1975); *Vega* v. *Civil Service Commission,* 385 F. Supp. 1376 (S.D.N.Y. 1974).

Lack of jurisdiction under § 1983 cannot be cured in this case by 28 U.S.C. § 1331, since the necessary $10,000 jurisdictional amount for federal question jurisdiction does not exist.

3. The complaint is not in conformity with F.R. Civ. P. 8(a)(2), which requires "a short and plain statement of the claim". In the absence of objection by the defendant on that ground and in the interest of expedition and economy, this court will nevertheless proceed to the merits.

4. Even if the deduction is treated as a garnishment, it does not constitute a violation of the *Sniadach* rule if plaintiff was entitled to a judicial hearing before a deduction. The purpose of a hearing, moreover, is not just to listen to people talk but to decide issues of fact or law. In this case there is no dispute that plaintiff engaged in an unauthorized strike. His own complaint states on page 5 that there was a work stoppage at the Plainview-Old Bethpage School District on September 6, 7, 8 and 11, 1972 and it does not deny that he took part in it, as set forth in the notice to him from the Superintendent of Schools. No attack appears to be made on the right of the state to impose a penalty on a teacher who engages in an unauthorized strike.

Plaintiff's failure to dispute his participation in the strike is not excused by the fact that he believed that the Board of Education could not give him an impartial hearing. In the first place, his case is not supported by the cases he cites. There is no indication that any school official had a

personal pecuniary interest which would be affected by whether plaintiff's absence from work was authorized or excusable, as was the case in *Gibson* v. *Berryhill,* 411 U.S. 564, 93 S.Ct. 1689 (1973). In the second place, the provision for judicial review of any administrative decision under Article 78 of the New York Civil Practice Law and Rules would permit determination of this point. Plaintiff was offered the right to proceed under Article 78 and did not do so. A bargaining unit for the teachers filed a 78 proceeding, which was unsuccessful and which has not been appealed. There is no indication in the record that the deduction from plaintiff's salary would have been made prior to a determination in an Article 78 proceeding if he had used that procedure.

Being supported by an affidavit, defendant's motion should be treated as one for summary judgment. F.R. Civ. p. 12(b)(6). Since there are no material issues of disputed fact, motion should be granted.

It is ORDERED that defendant's motion to dismiss the complaint be granted and that the Clerk of the Court enter judgment dismissing the complaint.

APPENDIX II

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

HARVEY S. KORNIT,

Plaintiff,

—against—

BOARD OF EDUCATION,
PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT,
PLAINVIEW, NEW YORK,

Defendant.

No. 75 Civ. 518

May 11, 1976

Appearances:
HARVEY S. KORNIT
Plaintiff, *pro se*

JOSEPH W. CAMPANELLA, ESQ.
GREGORY J. GUERCIO, ESQ.
Attorneys for Defendant

The Late Honorable ORRIN G. JUDD
District Judge

JUDD, *J.*:

MEMORANDUM AND ORDER

During the pendency of an appeal from this court's order dismissing the complaint, the plaintiff in this civil rights action has moved to amend the complaint to add the names of new parties defendant.

Appendix II

The motion was referred to one of the other judges of this court, and returned to the file without being submitted to this judge until plaintiff inquired about the matter recently.

The moving papers set forth the claim of liability against the new defendants in only general terms, and without including a proposed amended complaint. The attorney for the defendant Board of Education has opposed the motion. Permitting an amendment at this stage, by adding additional parties, and waiting for them to be served and to file an answer or make a motion, would further delay the case, and does not appear to be essential to the determination of the pending appeal.

It is ORDERED that the motion to amend the title be denied.

APPENDIX III

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 519—September Term, 1975

(Argued June 18, 1976—Decided September 15, 1976)

Docket No. 75-7540

HARVEY S. KORNIT,

Appellant,

v.

BOARD OF EDUCATION,
PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT,
PLAINVIEW, NEW YORK,

Appellee.

Before:

MANSFIELD, OAKES and GURFEIN,
Circuit Judges

Appeal from judgment of the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge,* dismissing claim that local school board acted in violation of due process by imposing penalties on striking teachers without prior judicial review.

Appendix III

Judgment vacated; cause remanded with instructions to dismiss for lack of jurisdiction.

HARVEY S. KORNIT,
Appellant Pro Se

JOSEPH CAMPANELLA,
Plainview, N.Y. for Appellee

PER CURIAM:

Appellant, a teacher in the Plainview-Old Bethpage School system, filed this suit in the United States District Court for the Eastern District of New York to recover $379.84 deducted from his wages for his participation in an illegal strike against the school system in September, 1972. This sum was deducted by the school board pursuant to its authority to impose penalties against illegal strikers under New York's Taylor Law. N.Y. Civil Service Law §§ 210(2)(d),(g) (McKinney 1973).[1] Appellant contends

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[1] Strikes by public employees are expressly unlawful under N.Y. Civil Service Law § 210(1) (McKinney 1973). Illegal strikers are subject to penalties, including loss of tenure. *Id.* § 210(2)(f), as well as payroll deductions, *Id.* § 201 (2)(g) (*sic*). The determination of an illegal strike is to be made in the first instance by the local school board. *Id.* § 210(2)(d). After this determination, the affected teacher has 20 days to file a notice of objections with the board. *Id.* § 210(2)(h). If the notice of objections raises a material issue of fact, the board is to set the matter for a hearing before a hearing officer empowered to reverse the board's findings. *Id.* In the present case, appellant's notice of objections raised no claim of fact which "would establish that the employee did not violate (the no-strike law)" *Id.* Therefore, a hearing was not accorded appellant.

that action of the school board violated due process because its members, representing the fiscal interests of the local government, were not impartial decision-makers. See, e.g. *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972); *Tumey* v. *Ohio,* 273 U.S. 510, 523 (1927). Appellant also argues that the summary deduction of the penalty from his wages constituted a garnishment which he claims cannot be constitutionally imposed without a plenary court proceeding. See e.g. *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969).

The suit against the Plainview-Old Bethpage Board of Education is brought under the Civil Rights Act, 42 U.S.C. § 1983, with jurisdiction, alleged under 28 U.S.C. § 1343(3). The district court, the late Orrin G. Judd, Judge, granted appellee's motion to dismiss the complaint, ruling against appellant on both his substantive claims. Since we find that the district court was without jurisdiction of the subject matter in this case, we vacate the judgment below and remand with instructions to dismiss therefore.

The first requisite for federal subject matter jurisdiction under 28 U.S.C. § 1343(3) and its substantive counterpart, 42 U.S.C. § 1983, is that the entity accused of depriving plaintiff of his civil rights be a "person". While the definition of this term has caused substantial controversy since its limitations in *Monroe* v. *Pape,* 365 U.S. 167 (1961), this court has recently and explicitly decided that a board of education is not a "person" for purposes of § 1983. *Monell* v. *Department of Social Services,* 532 F.2d 259, 263-64 (2d Cir. 1976, *petition for cert. filed,* 45 U.S.L.W. 3005 (U.S. July 2, 1976) (No. 75-1914). Under *Monell, supra*—whether or not each of us agrees with the exposition of legislative history by Mr. Justice Douglas for the Court in *Monroe* v.

Pape, supra, 365 U.S. at 187-92,[2] on which the *Monell* panel relied—this court has no subject matter jurisdiction to award relief against the Plainview-Old Bethpage Board of Education.[3]

Judgment vacated, with instructions to dismiss for lack of subject matter jurisdiction.

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[2] *See Brault* v. *Town of Milton,* 525 F.2d 730, 744 n.6 (2d Cir. 1975) (dissenting opinion).

[3] As a pro se pleading the complaint is to be read liberally. *Haines* v. *Kerner,* 404 U.S. 519 (1972) (per curiam). We would find subject matter jurisdiction under another statute, therefore, if a factual predicate for such action could be gleaned from the record. *See Lewis* v. *D.C. Dep't of Corrections,* 5333 F.2d 710, 711 (D.C. Cir. 1976) (per curiam): *Williams* v. *Vincent,* 508 F.2d 541, 543 (2d Cir. 1974). No alternate jurisdictional basis, however, appear to exist in this case.

APPENDIX IV

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of July, one thousand nine hundred and seventy-seven.

HARVEY S. KORNIT,

Appellant,

v.

BOARD OF EDUCATION OF PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT,

Appellee.

75-7540

A motion having been made herein by Appellant pro se for rehearing

Upon consideration thereof, it is

Ordered that said motion be and it hereby is DENIED.

Signature

.....

Walter R. Mansfield, U.S.C.J.

Signature

.....

James L. Oakes, U.S.C.J.

Signature

.....

Murray I. Gurfein, Circuit Judges

APPENDIX V

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

HARVEY S. KORNIT,

Plaintiff,

v.

BOARD OF EDUCATION PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT NEW YORK,

Defendant.

No. 75-C-518

Order

Sept. 15, 1977

COSTANTINO, D.J.

Pursuant to the Court of Appeals decision in this case, the action is hereby dismissed for lack of subject matter jurisdiction. So ordered.

Signature

.....

U.S.D.J.